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2 THE HONORABLE RICHARD A. JONES
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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE

12 STUDIO 010, INC. dba EQUADOSE,
13 Plaintiff,

14 v.
15 DIGITAL CASHFLOW LLC dba HEAR
16 CLEARLY; and CHRISTOPHER
ACKERMAN,
Defendants.

No. 2:20-cv-01018-RAJ

JOINT STATUS REPORT

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18 Plaintiff, STUDIO 010, INC. dba EQUADOSE (“Equadose”), and Defendants
19 DIGITAL CASHFLOW LLC dba HEAR CLEARLY (“Digital Cashflow” or “Hear Clearly”)
20 and CHRISTOPHER ACKERMAN, by undersigned counsel submit the following Joint
21 Status Report and Discovery Plan, pursuant to the Order Regarding FRCP 26(f) Conference,
22 Initial Disclosures and Joint Status Report (Dk 30), FRCP 26(f) and LCR 26(f).

23 1. Statement on the Nature and Complexity of the Case

24 The Parties do not believe the technology at issue is particularly complex or that the
25 case presents any unusual complications.

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2 **Plaintiff's statement:**
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4 Plaintiff asserts that the fact pattern and legal issues in this case are straightforward
5 and likely amenable to summary judgement, at least in part and based upon the claims
6 asserted in the Complaint. Plaintiff does not yet know what issues and allegations Defendants
7 will raise in their Answer, nor whether Defendants intend to assert any counterclaims.

8 Plaintiff's claims arise primarily from Defendants' fraudulent conduct before the
9 USPTO in pursuing the '191 Patent and their HEAR CLEARLY trademark registration, and
10 their subsequent enforcement activities based upon those fraudulently obtained patent and
11 trademark registrations. Plaintiff was making, using and selling its accused products prior to
12 the '191 Patent filing date and so invalidate Defendants' patent rights. Defendants were aware
13 of Plaintiff's pre-'191 Patent products but did not disclose these invalidating products to the
14 USPTO patent examiner in spite of their affirmative Duty of Disclosure. Defendant
15 Ackerman filed declarations with the USPTO, in the course of prosecuting the HEAR
16 CLEARLY trademark application, stating that Defendants' patented product had been sold
17 in commerce in the U.S. since at least April 2017, more than two years prior to the '191
18 Patent filing date, which would have barred him from even pursuing the subsequently filed
19 '191 Patent application. Defendants' defense to their own invalidating conduct is that Mr.
20 Ackerman lied to the USPTO in the trademark application, and also lied to Plaintiff in order
21 to induce Plaintiff to drop a prior trademark dispute.

22 The allegations and evidence of fraudulent conduct, and the resulting damages, are
23 relatively straight forward. Additionally, the technology involved in the '191 Patent is simple
24 and will not require tutorials or substantial explanatory evidence or briefing, being a spray
25 bottle with some tubing connected to it.
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2 **Defendants' statement:**
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4 Defendant Hear Clearly informed Amazon that certain listings on the Amazon.com
5 website for the current version of Plaintiff's product infringed at least one claim of Hear
6 Clearly's U.S. Patent No. 10,525,191, which was invented by Defendant Ackerman. Amazon
7 initially removed those listings from the Amazon.com website, and Plaintiff filed the current
8 Complaint in response. Thereafter, Amazon relisted those listings pending resolution of this
9 lawsuit.

10 While the technology of this case is not particularly complex, Plaintiff's Complaint
11 attempts to present a complicated array of charges, including patent noninfringement, patent
12 invalidity, various state law claims, a federal unfair competition claim, and an affirmative
13 claim of federal trademark infringement based on a registered trademark of Plaintiff. Further
14 complicating the case, Plaintiff makes allegations against Defendant Hear Clearly, a
15 corporation, and Defendant Ackerman, an individual. Due to the complex array of
16 contentions, a trial by jury may be necessary.

17 Defendants have not yet filed an Answer but have filed a Motion to Dismiss under
18 FRCP 12(b)(1) and 12(b)(6). After resolution of Defendants' Motion to Dismiss, if the case
19 is not entirely dismissed and Defendants are required to file an Answer, patent infringement
20 counterclaims against Plaintiff would be compulsory, should Defendant Hear Clearly, the
21 assignee of the '191 patent, choose to assert them.

22 2. Proposed Deadline for Joining Additional Parties

23 The Parties agreed to two weeks after Defendants file an Answer, Affirmative
24 Defenses and Counterclaims (if applicable), as the deadline for filing any motion to join
25 additional parties. This will provide opportunity for initial discovery to determine
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2 appropriateness (or lack thereof) of joining additional parties. The proposed schedule, below,
3 reflects this.
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5 3. Referral to Magistrate Judge.

6 The Parties do not agree to referral to a Magistrate Judge.
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8 RESULTS OF THE FRCP 26(f) CONFERENCE

9 The Parties held a telephonic conference on August 19, 2020, and additional
10 discussions via email correspondence. The results are presented below.
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12 4. Proposed Discovery Plan

13 a. Initial Disclosure Dates

14 Initial Disclosures were exchanged by September 2, 2020.
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16 b. Subjects, timing, and potential phasing of Discovery.
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18 The Parties agree there is no need to conduct discovery in phases. The Parties do
not anticipate phasing motions at this time, beyond the Local Rules for Patent Cases. The
Parties include alternatives for a proposed detailed pre-trial schedule herewith.
19

Plaintiff:

20 Plaintiff will be seeking discovery, among other relevant topics, related to:
21 Defendants' allegations of infringement of the '191 Patent; Defendants' claimed
22 conception/invention and product development timelines; preparation and prosecution of the
23 '191 Patent's application; Defendants' advertising and sales history; Defendants' trademark
24 prosecutions; Defendants' enforcement activities against other parties; Defendants'
25 knowledge (including knowledge of their attorneys and agents) of alleged prior art and public
26 uses prior to and during prosecution of the '191 Patent, and following the '191 Patent's issue;
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3 Defendants' intent in making certain statements and/or declarations to Plaintiff, the USPTO,
4 third parties and the public related to its alleged intellectual property rights and the bases
5 therefore; Defendants' allegations of trademark infringement against Plaintiff.

6 **Defendants:**

7 Defendants are not aware of issues that might make the discovery process any
8 more complex than might occur in any patent or trademark case. Because the accused device
9 is a mechanical one and relatively simple in its complexity, Defendants envision no particular
10 discovery issues being presented. Defendants may seek measures to lessen any burden on
11 third parties, particularly Amazon.com.

12 **Claim Construction:**

13 Regarding claim construction, the Parties do not anticipate a need for live witness
14 or expert testimony at a claim constructing hearing. Plaintiff does not anticipate, at this time
15 based upon the current claims in the lawsuit, need for any expert evidence or reports for claim
16 construction although this may change depending on Defendants' Answer and Counterclaims
17 (if applicable). Defendants believe that any presentation of evidence, including expert
18 opinion, can be provided using declarations but has not determined whether any particular
19 form of evidence will be introduced at a claim construction hearing.

20 c. Electronically Stored Information.

21 The Parties are conferring in an effort to determine whether they can stipulate to
22 a modified version of the Model Agreement on ESI.

23 **Plaintiff:**

24 Plaintiff's counsel will provide an initial draft of a modified version of the Model
25 Agreement on ESI and will work with Defendants' counsel to create workable procedures.

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3 Plaintiff does not believe, at this time, that this case will involve unusually large volumes of
4 documents or ESI. However, Plaintiff believes that metadata associated with many electronic
5 files will be crucial and must be preserved and included in all ESI production.

6 In addition, Plaintiff believes it is likely that text and phone records of Defendants,
7 including Digital Cashflow's owners and officers, will be relevant and subject to discovery
8 requests.

9 Plaintiff requests electronic documents be produced in native format, and that
10 production of imaged and original pdf documents be delivered in TIFF format including load
11 files for Nextpoint® software, in order to preserve metadata. For document production where
12 this is not feasible, Plaintiff requests OCR-readable pdf format files segregated by individual
13 document with metadata.

14 **Defendants:**

15 Defendant will work to negotiate and resolve a stipulated ESI agreement generally
16 similar in terms to the model agreement.

17 d. Preservation of Discoverable Information.

18 The Parties acknowledged their respective obligations, and do not anticipate
19 requirements for any unique or special procedures.

20 e. Location and Control of Electronically Stored Evidence.

21 The Parties have reviewed and do understand how their respective client's data
22 and ESI are stored and retrieved and foresee no particular issues that require addressing at
23 this time.

24 f. Serving Discovery Requests.

25 The Parties agreed that, in the event of receipt problems by email, there will be
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2 leniency in agreeing extensions to response dates.
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4 **Plaintiff:**

5 Plaintiff agrees that discovery requests may be served by email (with Read
6 Receipt Requested or other means of affirmative confirmation of receipt) with electronic
7 copies of requests in both PDF and MS Word format, with copy by USPS First Class Mail.
8 Plaintiff's counsel explained that its firm has had problems with reliability of email service
9 in the past.

10 **Defendants:**

11 Defendants request service of discovery requests and responses solely by email
12 and does not agree to serve physical copies of discovery requests (particularly in the current
13 environment where attorneys and staff are more routinely working from home offices).
14

15 g. Privilege Issues.

16 **Plaintiff:**

17 Plaintiff intends to pursue discovery related to: (1) the '191 Patent prosecution
18 and maintenance, including communications between Ackerman and patent counsel relating
19 to duties to disclose prior art and inventor's disclosures and sales, and any related patent
20 applications; (2) enforcement activities related to the '191 Patent and any related patent
21 applications; (3) the prosecution and maintenance of Defendants' U.S. trademark registration
22 5,567,221 (HEAR CLEARLY), including communications between Defendants and counsel
23 related to allegations of use in commerce of the mark; (4) enforcement activities related to
24 the HEAR CLEARLY mark.

25 Plaintiff anticipates that Defendants may object to some of these requests on the
26 bases of attorney-client privilege and/or work product privilege. Plaintiff intends to seek early
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3 resolution of such disputes promptly rather than leaving such disputes to the end of the
4 Discovery Period.
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6 **Defendants:**

7 Defendants do not surrender the privilege of relative to communications between
8 client and counsel and anticipate the necessity of resolving claims of privilege relative to
9 specific logged communications. Given Plaintiff's indication that it will seek privileged
10 materials, Defendant's respectfully submit that Alternative 2 in Section E of the Model
11 Agreement re: Discovery of Electronically Stored Information is more appropriate for this
12 case. Specifically, Defendants submit that Privilege logs be produced to all other parties no
13 later than 30 days before the deadline for filing motions related to discovery unless an earlier
14 deadline is agreed to by the parties. To minimize burdens to all parties, Defendants propose
15 a cutoff date for logging privileged materials to be the date when Defendants first provided
16 its notice to Amazon.com regarding Plaintiff's listings.
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18 h. Inadvertent Disclosures. Beyond the Washington RPC and FRE 502, the
19 anticipated stipulated protective order will address procedures for inadvertent disclosures.
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21 i. Proposed Limitations on Discovery.

22 The Parties agree that the default rules under the FRCP, as supplemented by any
23 limitations defined in the Model Agreement on ESI or that may otherwise be agreed to by the
24 Parties, are sufficient in this case. The Parties agree that they foresee no need for expanded
25 discovery limits for Interrogatories or Depositions at this time.
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27 j. Discovery Management

28 The Parties agreed to work together in good faith to minimize discovery disputes.
29 The Parties do not anticipate need for a discovery referee.
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3 i. Sharing Discovery. The Parties agree to produce documents and things
4 received via third party subpoena without formal request. The Parties will consider issuing
5 common or joint subpoenas to third parties (e.g. Amazon.com, Inc.).

6 ii. Discovery or Case Management Conferences. The Parties do not anticipate
7 a need at this time.

8 iii. Magistrate Judge assistance for settlement conference. Plaintiff does not
9 anticipate a need at this time. As set forth below regarding Prompt Case Resolution,
10 Defendants respectfully submit that a neutral may be able to assist the parties reach a
11 negotiated resolution.

12 iv. Pre-trial Order. The Parties do not believe an abbreviated pre-trial order
13 would be beneficial.

14 k. Discovery Related Orders.

15 The Parties agree that a stipulated protective order will be required, which will
16 include an “Attorney’s Eyes Only” classification. The Parties are engaged in working to
17 agree to the form of such an agreement and will present it to the Court for approval.

18 The Parties do not anticipate a need for other discovery orders at this time.

19 5. Parties’ views, proposals, and agreements on all items set forth in Local Civil Rule

20 26(f)(1) not addressed above:

21 a. Prompt Case Resolution. The Parties agree it will be beneficial to engage in early
22 settlement discussions.

23 Plaintiff asserts that that direct negotiations between counsel and the Parties
24 should be pursued up front, but if this fails then the Parties should utilize the court mediation
25 program.

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Defendants will agree to participate in direct negotiations and believe a neutral
mediator, whether a Magistrate Judge or private third-party, could be more helpful.

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b. ADR. The Parties have not yet agreed to the specific form of mediation, or
whether to utilize Court resources. The Parties do not agree to utilize the Individualized Trial
Program (LCR 39.2). The parties agree that negotiation/mediation would be useful, but do
not agree to arbitration or LCR 39.2 procedures.

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c. ADR Timing. The Parties have agreed to target October 2020 for a virtual face-
to-face mediation if direct negotiations fail to resolve the case.

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d. Related Cases. The Parties identified two related cases:

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i. Nuance Medical LLC, unrelated to Plaintiff, filed a Complaint
in the Southern District of California for Declaratory Judgment of Noninfringement,
Invalidity, and Inequitable Conduct involving the '191 Patent on August 7, 2020. *See Nuance*
Medical LLC v. Digital Cashflow LLC, 3:20-cv-01537 (S.D. Cal. August 7, 2020). The
current status of that case is pending.

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ii. Blue Echo Care LLC dba Amazon Seller Blue Echo Care filed
a Complaint in the Northern District of Georgia for Declaratory Judgment of
Noninfringement and Invalidity involving the '191 Patent and a state law claim of tortious
interference on August 28, 2020. *See Blue Echo Care LLC v. Ackerman*, 1:20-cv-03586
(N.D. Ga. August 28, 2020). The current status of that case is pending.

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iii. Plaintiff filed a Petition to Cancel Defendants' HEAR
CLEARLY trademark registration on July 22, 2020 at the USPTO, Proceeding Number
92074783. Plaintiff does not believe the Cancellation Proceeding will directly impact this
case, as Plaintiff has not asserted a claim for cancellation in this lawsuit at this time.

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3 Defendants have filed a motion to suspend in that proceeding, seeking to stay the cancellation
4 proceeding pending the outcome in this lawsuit.

5 6. Date for Completion of Discovery.

7 6. ***Plaintiff***

8 Plaintiff believes discovery related to Claim Construction can be completed by
December 21, 2020 pursuant to Local Rule 133.

9 Plaintiff believes all discovery can be completed by July 16, 2021.

10 10. ***Defendants***

11 As Defendants' Motion to Dismiss is pending, it is somewhat speculative to estimate
12 when Defendants will be required to file their Answer, which is a triggering point for the
13 deadlines in the Patent Local Rules. Defendants, however, do not seek any deviation from
14 the default deadlines in the Patent Local Rules for claims of patent infringement. Also,
15 Defendants believe that all discovery can be completed by three months after the Court's
16 ruling on claim construction.

17 18. 7. Bifurcation. The Parties agree that bifurcation would not be appropriate or efficient
in this case.

19 20. 8. Pretrial Statement and Pretrial Order

21 The Parties do not believe the LR 16 Pretrial Order and Pretrial Statements should be
22 dispensed with.

23 24. 9. Suggestions for Shortening or Simplifying the Case

25 26. ***Plaintiff's Statement***

27 Plaintiff asserts that, due to the simplicity of the technology limited extent of
prosecution history for the '191 Patent, an early claim construction should be conducted and

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2 likely will be dispositive.
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Defendants' Statement

5 Defendant is not aware of any suggestion that might shorten or simplify the case.
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7 10. Proposed Trial Date:

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Plaintiff:

9 January 31 – February 4, 2022
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Defendants:

12 Given the present uncertainties regarding the COVID-19 and the length of claim
13 construction proceedings, Defendants submit that a trial date of January 31 – February 4,
14 2022 may be aggressive and respectfully suggest establishing a suitable time nine months
15 following the Court's ruling regarding claim construction, whichever is later, or requiring the
16 parties to submit an additional scheduling proposal following an order regarding claim
17 construction.

18 11. Jury Trial.

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Plaintiff:

20 Plaintiff requests bench trial before the Court. Plaintiff asserts that both Parties
21 waived their right to jury trial in this dispute by the express waiver in their respective Amazon
22 Services Business Solutions Agreement.

23
Defendants:

24 Defendants believe that the parties may have a right to present issues in this case to a
25 jury, and will seek a jury trial for those issues.
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27 12. Estimated Trial Length. The Parties anticipate five (5) trial days, total, exclusive of
28 any claim construction hearing.
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3 13. Trial Counsel.

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5 **Plaintiff's Trial Counsel:**

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14. Conflict Dates

Plaintiff's conflict dates are:

The week of Thanksgiving 2020;

December 19, 2020 – January 15, 2021;

April 3-12, 2021;

June 15-July 10, 2021;

August 16-27, 2021;

November 22-26, 2021

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3 December 20, 2021 – January 14, 2022.
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5 Defendants' conflict dates are:
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7 No additional dates.
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15. Date When Service Will Be Completed.

7 Service on the Parties named to date is complete. Plaintiff does not currently
8 anticipate naming additional parties but cannot make a final determination until Defendants'
9 Answer is filed. Defendants have not yet made a determination on whether to file
10 counterclaims.

11 16. Scheduling Conference. None of the Parties request a scheduling conference at this
12 time.

13 17. FRCP 7.1 Disclosures.

14 Plaintiff: Completed July 1, 2020 (Dk 5);

15 Defendants: To be completed by September 11, 2020.

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3 PROPOSED DETAILED SCHEDULE

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5 The Parties submit the following proposed schedule, with consideration of the
 6 following factors:

7 Plaintiff's Position: Plaintiff asserts the timeline for the Local Rules for Patent Cases
 8 (LR 120 et seq) commences on August 24, 2020, the date Defendants' Answer or responsive
 9 pleading was due. Defendants have already asserted in pleadings filed with this Court that
 10 Plaintiff's product infringes the '191 Patent and intends to assert infringement claims if their
 11 pending Motion to Dismiss is not granted. Further, Plaintiff believes that claim construction
 12 will be dispositive for many issues in this case, and therefore claim construction timelines –
 13 most of which are merely exchanges between the Parties not filed with the Court – should
 14 proceed without delay and without awaiting the Court's ruling on the Motion to Dismiss.

15 Defendants' Position: Given the pendency of Defendants' motion to dismiss,
 16 Defendants propose that the schedule be set based on when and if Defendants are required to
 17 file an Answer. *See, e.g.*, Local Rule 123. Once that date is established, Defendants do not
 18 seek deviation from the default Local Rules involving claims for patent infringement.

19 The Parties' Position: The Parties propose a Trial Date which is at least five (5)
 20 months after the Deadline for Dispositive Motions, to permit adequate time for the Court to
 21 issue a ruling prior to incurring the costs associated with pre-trial submissions and trial
 22 preparations.

Event	Parties' Jointly Proposed Date
Answer to Complaint	To be determined
FRCP 26(f) Conference	Complete (August 19, 2020)
Initial Disclosures	Complete (September 2, 2020)
JSR	Complete (September 9, 2020)
Deadline for filing any motion to join additional parties	Not later than 14 days after the Court ordered date for Defendants to file their Answer.
Disclosure of Asserted Claims and Infringement Contentions (LR 120/LR 123(a))	Answer Date + 15
Non-Infringement and Invalidity Contentions & Document Production (LR 121, 123(a), 122)	Answer Date + 45
Mediation	October 2020
Exchange of Proposed Terms and Claim Elements for Construction (LR 130(a))	Answer Date + 65
Conferral re Proposed Terms for Construction (LR 130(b))	Promptly after exchange of Proposed Terms and Claim Elements for Construction
Exchange Preliminary Claim Constructions and Extrinsic Evidence (LR 131)	Answer Date + 95
Joint Claim Construction and Prehearing Statement (LR 132)	Answer Date + 140
Claim Construction Expert Disclosures / Expert Reports exchanged (LR 132(f))	Answer Date + 140
Rebuttal Reports exchanged re Claim Construction	Answer Date + 165
Claim Construction Expert Depositions completed	Answer Date + 190
Claim Construction Discovery Complete (LR 133)	Answer Date + 190

Event	Parties' Jointly Proposed Date
Opening Claim Construction Briefs (LR 134(a))	Answer Date + 195
Responsive Claim Construction Brief (LR 134(c))	Answer Date + 210
Claim Construction Hearing (LR 135)	Per Court Order (avoiding Parties' conflict dates)
All motions related to discovery filed by	Dependent on Date of Claim Construction Ruling
Fact Discovery Completion	Dependent on Date of Claim Construction Ruling
Expert Reports Exchanged re Patent Infringement, Invalidity, Non-patent Claims, Damages & etc.	Dependent on Date of Claim Construction Ruling (avoiding Parties' conflict dates)
Rebuttal Expert Reports Exchanged re patent infringement, non-patent claims, damages & etc.	Dependent on Date of Claim Construction Ruling (avoiding Parties' conflict dates)
Expert Depositions	Dependent on Date of Claim Construction Ruling (avoiding Parties' conflict dates)
Dispositive Motions Deadline	Dependent on Date of Claim Construction Ruling
Trial (Estimate 5 days)	Dependent on Date of Claim Construction Ruling (avoiding Parties' conflict dates)

DATED this September 9, 2020

<p>1</p> <p>2</p> <p>3 PLAINTIFF</p> <p>4 By <u>Mark E. Beatty/</u></p> <p>5 Dated: <u>September 9, 2020</u></p> <p>6 Kurt M. Rylander, WSBA 27819</p> <p>7 Mark E. Beatty, WSBA 37076</p> <p>8 Telephone: 360.750.9931</p> <p>9 Fax: 360.397.0473</p> <p>10 Email: rylander@rylanderlaw.com</p> <p>11 Email: beatty@rylanderlaw.com</p> <p>12 PO Box 250</p> <p>13 Vancouver, WA 98666</p> <p>14</p> <p>15 <i>Attorneys for Plaintiffs</i></p>	<p>1</p> <p>2</p> <p>3 DEFENDANTS</p> <p>4 <u>James Wilson</u></p> <p>5 Dated: <u>September 9, 2020</u></p> <p>6 Mark Lawrence Lorbiecki, WSBA # 16796</p> <p>7 WILLIAMS, KASTNER & GIBBS PLLC</p> <p>8 601 Union Street, Suite 4100</p> <p>9 Seattle, WA 98101-2380</p> <p>10 Tel: (206) 628-6600</p> <p>11 Fax: (206) 628-6611</p> <p>12 Email: <u>mlorbiecki@williamkastner.com</u></p>
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